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## CULTURE AND CRIME:

### *Kargar* and the Existing Framework for a Cultural Defense

NANCY A. WANDERER<sup>†</sup> AND CATHERINE R. CONNORS<sup>††</sup>

"Ignorance of the law excuses no man."  
JOHN SELDEN, TABLE TALK 65 (1689)

"[T]o constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such a vicious will."

4 WILLIAM BLACKSTONE COMMENTARIES \*21

Anglo-American jurisprudence is a balancing act of competing rights. The two quotes above summarize the clash of two of our most fundamental of rights: the right of society to be safe and to impose collective norms, against the right of the individual to adhere to his or her own beliefs and to avoid criminal opprobrium when free of intent to harm. The debate about whether "culture" should be viewed as relevant in assessing criminality exemplifies this clash between individual and societal rights and implicates

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our most basic concepts of innocence and guilt. When, if ever, should a criminal defendant's cultural background alleviate or excuse the defendant from responsibility for conduct that would otherwise result in conviction or punishment?

Currently, this question is the subject of great interest and debate, due at least in part to the recent influx of immigrants to the United States from nations whose cultures are not based on Western traditions or European legal principles.<sup>1</sup> A host of recent articles discuss culture as a potential defense, ranging from feminist and sociological perspectives<sup>2</sup> to discussions of the existing case law in

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1. The recent expansion of non-European immigrant communities has been attributed to the passage of federal immigration laws, beginning in 1965, that altered the historic preference for European immigrants. See Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1120 (1996). Prior to 1965, preference was expressly given to established European groups, and Japanese immigrants were barred entirely. See *id.* at 1167 n.149. Today, however, the majority of the twenty million immigrants living in the United States came from non-European countries. See *id.* In 1992, for example, 29% immigrated from Asian countries and 44% were from Latin America and the Caribbean. See *id.* (citing Bruce W. Nelan, *Not Quite So Welcome Anymore*, TIME, Fall 1993, at 10, 10 tbl. (special issue)).

Many commentators believe that increasing numbers of criminal defendants are asserting a "cultural defense" because of the recent influx of immigrants, mainly Asians, to the United States. See Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 56 n.67 (1995) (citing Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 751 ("[D]ue to the large influx of Asians into the United States, a clash between Asian cultures and the American criminal justice system currently exists.")). *Id.* at 56 n.67. See also John C. Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 116 & n.186 (1986).

2. See, e.g., Farah Sultana Brelvi, *"News of the Weird": Specious Normativity and the Problem of the Cultural Defense*, 28 COLUM. HUM. RTS. L. REV. 657, 663 (1997) (concluding that cultural defense should be allowed in the examination of individual defendant's circumstances but "the dangerous tendency to extrapolate the defense and arrive at generalized conclusions about communities of 'others' must be checked."); Cathy C. Cardillo, *Violence Against Chinese Women: Defining the Cultural Role*, 19 WOMEN'S RTS. L. REP. 85, 85 (1997) (examining the utility of the cultural defense in its application to violent acts against immigrant Chinese women); Alice J. Gallin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 725 (1994) (arguing that "cultural defenses should not be used because the United States should not allow other cultures, which do not respect individual liberty and equality in the same manner as American culture does, to subvert the value we place on preventing domestic abuse"); Tracy E. Higgins, *Anti-Essentialism*,

which cultural factors played a role.<sup>3</sup>

Although the scholarly discussion on this topic has been broad, the actual application of such a defense has generally been infrequent and untested at the appellate level. For example, at the trial and sentencing level, anecdotal evidence exists that some courts have taken into

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*Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996) (exploring the theoretical dilemma of reconciling the feminist goal of maintaining a global political movement while avoiding charges of cultural imperialism "[i]n the face of profound cultural differences among women"), *id.* at 89; Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1312 (1991) (exploring the ways "culture facilitates the decriminalization of violence against women"); Susan Girardo Roy, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263, 290 (1995) (advocating for "a comprehensive program directed and funded by the federal government [to] send a message to agencies, courts, and potential batterers and victims that immigrant women have the right to enjoy a non-abusive life in this country" rather than the use of the cultural defense in domestic violence cases) [hereinafter *Restoring Hope or Tolerating Abuse?*], *id.*; Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill their Wives*, 24 COLUM. J. L. & SOC. PROBS. 597, 597 (1991) (analyzing three types of legal systems in which a man can kill his wife and escape punishment); Todd Taylor, *The Cultural Defense and its Irrelevance in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331, 364 (1997) (advocating formal recognition of the cultural defense while stressing its irrelevancy in the area of child protection law); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1616 (1996) (calling for the abandonment of "the ethnocentric notion of the inferiority of certain cultures").

3. See, e.g., Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163 (1998); Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80 (1990); Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717 (1998); Michael Fischer, *The Human Rights Implications of a "Cultural Defense"*, 6 CAL. INTERDISC. L.J. 663 (1998); Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141 (1994); Dan M. Kahan, *Ignorance of Law is an Excuse—But only for the Virtuous*, 96 MICH. L. REV. 127 (1997); Malek-Mithra Sheybani, *Cultural Defense: One Person's Culture is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L. J. 751 (1987); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101 (1997); Donna L. Kotake, *Survey: Women and California Law*, 23 GOLDEN GATE U. L. REV. 1069 (1993); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986); Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51; Cassandra Terhune, *Cultural and Religious Defenses to Child Abuse and Neglect*, 14 J. AM. ACAD. MATRIM. LAW 152 (1997); Sharon M. Tomao, *The Cultural Defense: Traditional or Formal*, 10 GEO. IMMIGR. L.J. 241 (1996).

account, or have allowed to be taken into account, aspects of a defendant's culture when establishing *mens rea* or determining an appropriate sentence.<sup>4</sup> Appellate decisions in which culture has been examined as directly relevant to the issue of guilt, however, are relatively rare.<sup>5</sup>

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4. See, e.g., *Two Iraqi Men Face Hearing*, OMAHA WORLD-HERALD, Nov. 26, 1996, at 22 (stating that father of two underage girls pleaded innocent to child abuse charges after he forced them to marry, claiming he was following Islamic culture which allows girls to marry at any age); Myrna Oliver, *Immigrant Crimes Cultural Defense—A Legal Tactic*, L.A. TIMES, July 15, 1988, at 1 (stating that Kong Moua, a Hmong tribesman from Laos, charged with kidnapping and rape, was allowed to plead guilty to the lesser charge of false imprisonment based on cultural evidence that *zij pojniam*, or "marriage by capture" is an accepted form of matrimony in the Hmong culture) [hereinafter *Immigrant Crimes*]; Ann W. O'Neil, *Judge Rules Exorcism Death Manslaughter Trial: Two Korean Christian Missionaries are Cleared of Murder in the Killing of Kyung-Ja Chung During Cleansing Ritual*, L.A. TIMES, April 17, 1997, at A1 (stating that judge found two Korean Christian missionaries guilty of involuntary manslaughter rather than second-degree murder in the stomping death of a missionary's wife during a demon-cleansing ritual called a *sukido*); Dick Polman, *When is Cultural Difference a Legal Defense? Immigrants' Native Traditions Clash with U.S. Law*, SEATTLE TIMES, July 12, 1989, at A1 (stating that Chinese immigrant Dong Lu Chen was convicted of manslaughter and sentenced to only five years' probation for killing his wife after presenting a cultural defense that "traditional Chinese notions about the shame of adultery had propelled him to violence") [hereinafter *When is Cultural Difference a Legal Defense?*]; David Talbot, *The Ballad of Hooty Croy 'True Believer' Attorney Tony Serra Fights His Own Version of the Indian Wars—in a Courtroom*, L.A. TIMES, June 24, 1990, at 16 (describing attorney's use of cultural defense to convince jury to acquit American Indian defendant of first-degree murder charge). But see *U.S. Justice System Called Ambivalent on Use of 'Cultural Defense' by Immigrants*, L.A. TIMES, Dec. 13, 1987, at 6 (noting that attorney opted not to use cultural defense in case of Fumiko Kmura who killed her children upon learning her husband had a mistress in keeping with Japanese custom of parent-child suicide; cultural defense rejected in the case of a Laotian man convicted of killing his wife because she intended to take a job working for another man).

5. Cases at the appellate level dealing with the relevance of culture have typically focused on whether the necessary intent had been formed. See, e.g., *United States v. Mohammad*, 53 F.3d 1426, 1433 (7th Cir. 1995) (determining that testimony concerning passive role of women in Islamic culture in trial of husband and wife for conspiracy and fraud did not cause wife's defense to be "mutually antagonistic" to husband's defense or prevent "the jury from making a reliable judgment about guilt or innocence"); *United States v. Ojo*, No. ACM32094, 1997 WL 66725 at \*1 (A.F. Ct. Crim. App.) (considering and rejecting "appellant's argument that he was raised in Nigeria which has different cultural views" after he appealed his conviction of carnal knowledge, adultery, assault of a child, and indecent assault); *United States v. Calvin*, No. ACM 30944, 1995 WL 755285, at \*1 (A.F. Ct. Crim. App.) (noting that Navajo victim responded to defendant's consent theory in rape case that relied heavily

The notable exception is *State v. Kargar*,<sup>6</sup> in which the Maine Supreme Judicial Court reversed the conviction of an Afghani refugee for gross sexual assault. The appellate court found that the court below had concluded erroneously that the defendant's cultural background was irrelevant in determining whether the prosecution should have been dismissed under Maine's *de minimis* statute.<sup>7</sup> Essentially finding that it was an abuse of the trial court's discretion not to dismiss the prosecution, the Court vacated the conviction and instructed the court to dismiss the case on remand.<sup>8</sup>

Because *Kargar* stands alone in this respect, the case presents a useful starting point for analyzing the viability of a cultural defense in American jurisprudence. The defendant's culture was *not* invoked in that case simply to reduce his sentence or dilute *mens rea*; rather, it absolved him of guilt and reversed his conviction. The basis of the

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on her "failure to report the incident to law enforcement authorities" by testifying that "reporting such incidents to authorities contradicted her tribal custom"); *Ha v. Alaska*, 892 P.2d 184, 195 (Ct. App. 1995) (rejecting defendant's claim of self defense based on his Vietnamese cultural background that, he claimed, taught him "that all police are corrupt, that one can expect no help from the authorities, and that people must take the law into their own hands to resolve personal disputes"); *People v. Wu*, 286 Cal. Rptr. 868, 887 & n.6 (1991) (ruling that Chinese defendant was entitled to have jury instructed that it could consider evidence of her cultural background in determining existence or nonexistence of relevant mental states but that it could not consider evidence of her cultural background with any issue in a second-degree murder case); *State v. Her*, 510 N.W.2d 218, 221 (Minn. Ct. App. 1994) (holding that prosecutor did not commit prejudicial misconduct in prosecution of Hmong defendant for first-degree criminal conduct on Hmong woman when he distinguished defendant's nationality from that of the jurors in closing argument because the comments were "primarily a proper commentary" on the "apparent differences between Hmong and American cultures in their treatment of rape, adultery, and female sexuality [which] were a major element of the trial"); *State v. Lee*, 494 N.W.2d 475, 480-81 (Minn. Ct. App. 1992) (holding that trial court did not abuse its discretion in allowing testimony on Hmong culture to rebut "misleading testimony of defendant's witness" intended to "convey the impression that in the Hmong community the complaints by [the complainants] were not considered credible because Hmong women who have been raped do not act, post-rape, as these complainants did."); *People v. Singh*, 516 N.Y.S.2d 412, 415 (1987) (holding that city ordinance prohibiting possession of exposed knife did not violate Sikh priests' right to freedom of religion even though Sikh religion requires priest to carry exposed kirpan, or sword).

6. 679 A.2d 81 (Me. 1996).

7. See *id.* at 86 (citing ME. REV. STAT. ANN. tit. 17-A, § 12(1)(C) (West 1983)).

8. See *Kargar*, 679 A.2d at 83.

decision—application of a *de minimis* statute<sup>9</sup>—presents a context for analyzing the cultural defense that is both practical and philosophically fertile. Because *de minimis* statutes are derived from a section of the Model Penal Code which identifies fundamental values of our legal system,<sup>10</sup> exploration of the cultural defense through the lens of a *de minimis* statute exposes the basic building blocks of our criminal jurisprudence. Additionally, alternative arguments supporting Kargar's innocence, raised by the defendant but not ruled upon in the case, identify other existing, constitutional avenues into which the cultural defense might also fit, including protections of freedom of religion, parental rights and privacy, and due process. Hence, examination of the *Kargar* decision and the arguments put forth in that case provide a useful overview of the existing and potential avenues for pursuing a cultural defense.

Using *Kargar* as a backdrop, this article examines the cultural defense in the context of each of these multiple legal doctrines and searches for core common principles. These common principles can then form a basis for developing a test for the viability of the cultural defense in general and explain why and when a cultural defense should be recognized and accepted in the criminal context. Such a test can create a template to use in addressing the myriad questions arising in contemplation of a cultural defense.

As is usually the case, the first conundrum is definitional. What is culture?<sup>11</sup> If a "foreign" culture,

9. A *de minimis* statute allows the trial judge to dismiss a prosecution if certain factors are met, establishing that no societal interest exists in pursuing the case to convict. Currently four states and Guam have a *de minimis* statute. See 9 GUAM CODE ANN. § 7.67 (1998); HAW. REV. STAT. ANN. § 702-236 (1993); ME. REV. STAT. tit. 17-A, § 12 (West 1983); N.J. STAT. ANN. § 2C: 2-11 (West 1995); 18 PA. CONS. STAT. ANN. § 312 (West 1998). Other states give the power to dismiss through the *nol pros*, conditional on the court's approval, see MODEL PENAL CODE § 2.12 cmt. at 404 n.20 (1985) (citing ARK. STAT. ANN. § 43-1230 (1964); ARIZ. R. CRIM. P. 16.6; GA. CODE ANN. § 17-8-3 (1997); OHIO REV. CODE ANN. § 2941.33 (Anderson 1996); TEX. CODE CRIM. P. ANN. art. 32.02 (West 1989)), or give the courts the power to dismiss on their own initiative through similar statutes and court rules, see IOWA R. CRIM. P. 27(1); N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1993); ORE. REV. STAT. § 135.755 (1997); UTAH CODE ANN. § 77-2-4 (1997); WASH. SUPER. CT. CRIM. R. 8.3. See also *infra* note 61 and accompanying text. These statutes and rules provide a currently existing avenue for application of a cultural defense.

10. See MODEL PENAL CODE § 212 (1980).

11. See Michael Fischer, *The Human Rights Implications of a "Cultural*

meaning one from another country, may be deemed relevant in assessing guilt under some circumstances, is the same true for an "indigenous" culture? Can a father, for example, defend himself against an incest charge brought by his daughter on the basis that, in his "backwoods, red neck" culture, such an act is considered a normal part of growing up?<sup>12</sup> Are some cultures more worthy of recognition than others? Should culture be relevant only in sentencing or *mens rea* determinations? Should culture be relevant only as to certain types of crimes?

Ultimately, examination of the currently available defenses shows that there is nothing really new about a cultural defense; existing constitutional, statutory, and common law jurisprudence has already contemplated and balanced the societal interests at conflict when such a defense is raised. Although certain fine tuning responsive to current types and levels of cultural clashes makes sense—for example, adoption of a *de minimis*-type statute in all jurisdictions seems appropriate—radical change in the law or recognition of a freestanding cultural defense is not

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*Defense*," 6 S. CAL. INTERDISC. L.J. 663, 669 (1998) (citing WILLIAM HAVILAND, ANTHROPOLOGY 278 (5th ed. 1989) (discussing various definitions and adopting the following definition for "culture": "[a] set of rules or standards shared by members of a society which, when acted upon by the members, produce behavior that falls within a range of variance the members consider proper and acceptable").

12. A few scholars have urged "nonexculpatory" treatment of offenders who have come from "rotten" social backgrounds, "based on notions of economic fairness and reciprocal justice." Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW AND INEQUALITY J. 9, 13-14 (1985). A "nonexculpatory defense" is a defense that is "unrelated to guilt and desert"; it "says that though the individual is guilty of a crime deserving punishment, there are other considerations—for example, public policy, morality, or jurisprudential ideals—which persuade us not to punish." *See id.* at 13. Because American society is based upon "mutuality, these scholars argue, if some segments of society are deprived of the benefits of the 'social contract,' they are also excused from the obligations imposed upon them by it." *See id.* at 14. Attorney William Kunstler was prepared to raise the defense of "black rage" in the case of Colin Ferguson, the gunman later convicted of killing six and wounding seventeen white and Asian passengers on a Long Island commuter train, before his client fired him. Kimberly M. Copp, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205, 207 & n.14 (1995). Proponents of the black rage defense assert that African-Americans become enraged and commit crimes after being constantly subjected to society's oppressive racism and unfair prejudice. *See id.* at n.13. Criminal defendants have also asserted "urban survival syndrome" and "urban fear syndrome" as defenses. *See id.* at n.12.



warranted. Greater or separate acknowledgment of such a defense would tilt the balance of interests too far in favor of society's communal concerns to the detriment of individual rights, including the rights of immigrants to escape the strictures of their former cultures and live free from harm.

## I. STATE OF MAINE V. KARGAR

### A. *The Charges Against the Defendant*

Mohammed Kargar, born in Afghanistan, spent four years fighting in the Mujahideen, the resistance to the Russian invasion of his country.<sup>13</sup> He and his family then emigrated through Iran and Italy to the United States.<sup>14</sup> At the time of his arrest, he had lived in the United States for approximately four years.<sup>15</sup> His youngest son, Rahmadan, was born in America.<sup>16</sup>

Kargar was convicted of two counts of gross sexual assault under Maine law<sup>17</sup> for kissing Rahmadan's penis.<sup>18</sup> One count related to a photograph allegedly showing him kissing the penis when the child was approximately nine months old.<sup>19</sup> The second count related to an incident in which he allegedly kissed the child's penis while undressing the child to go to bed when the child was approximately fifteen months old.<sup>20</sup>

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13. See Appellant's Brief at 4, *State v. Kargar*, 679 A.2d 81 (Me. 1996) (No. 7719, CUM-95-300).

14. See *id.*

15. See *id.*

16. See *id.*

17. ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B) (West 1983).

18. See Appellant's Brief at 1, *Kargar*, (No. 7719, CUM-95-300).

19. See *id.* at 4.

20. See *id.* at 6. Interestingly, the police were made aware of the photograph and the alleged undressing incident by a neighbor of the Kargars. See *State v. Kargar*, 679 A.2d 81, 82 (Me. 1996). Kargar's wife testified that the neighbor saw the photograph when Mrs. Kargar was showing the neighbor the Kargar photo album. See Appellant's Brief at 9, *Kargar* (No. 7719, CUM-95-300). Next to the photograph of Mohammed with Rahmadan, was a photograph of Mohammed standing alone in full combat gear, holding a Kalashnikov rifle. See *id.* Mrs. Kargar explained to the neighbor that her husband had spent years killing Russians. See *id.* at 10. Shortly thereafter, based on the neighbor's report, the police searched the house for the photograph, and the neighbor's child testified—and was the sole witness—as to the alleged undressing incident. See *Kargar*, 679 A.2d at 82. The neighbor was of Russian origin. See Appellant's

Maine's gross sexual assault statute prohibits any contact between an adult's mouth and a child's penis.<sup>21</sup> No intent or sexual gratification is required. Hence, when Kargar admitted he had kissed his child's penis, he admitted to every element of the crime.<sup>22</sup>

Maine is one of five jurisdictions that have adopted a *de minimis* statute.<sup>23</sup> Such statutes are derived from the Model Penal Code. The language of the Code is essentially identical to that of Maine's statute, and provides:

#### Section 2.12. De Minimis Infractions

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(1) was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.<sup>24</sup>

Based on this statutory language, Kargar moved to dismiss the prosecution against him.<sup>25</sup>

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Brief at 10, *Kargar* (No. 7719, CUM-95-300).

21. Section 253(1)(B) of Maine's gross sexual assault statute provides, in pertinent part: "1. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and: . . . B. The other person, not the actor's spouse, has not in fact attained the age of 14 years." ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B) (West Supp. 1998).

22. As to the second, undressing incident, Kargar said it simply did not happen. See Appellant's Brief at 9, *Kargar* (No. 7719, CUM-95-300).

23. See 9 GUAM CODE ANN. § 7.67 (1996); HAW. REV. STAT. § 702-236 (1993); ME. REV. STAT. tit. 17-A, § 12 (West 1983); N.J. STAT. ANN. § 2C: 2-11 (West 1995); 18 PA. CONS. STAT. ANN. § 312 (West 1998).

24. MODEL PENAL CODE § 2.12 (1980).

25. See *State v. Kargar*, 679 A.2d 81, 83 (Me. 1996).

B. *The Cultural Evidence Submitted in Support of the Motion to Dismiss and Produced During the Sentencing Stage*

In support of Kargar's motion, the defense submitted evidence that Kargar's action was considered neither wrong nor sexual under Islamic law and that Kargar did not know his action was illegal under Maine law.<sup>26</sup> This evidence included letters from a professor at the University of Arizona and from the Director of the Afghan Mujahideen Information Bureau, explaining that kissing the penis of one's child is not considered either sexual or wrong in Afghanistan under Islamic law.<sup>27</sup> A caseworker from the Maine Department of Human Services (DHS), who had investigated the incident after the arrest, also testified. As an on-site field research assistant in Islamic northern Nigeria, she had spoken with academics, written to the deputy ambassador at the Afghan mission in New York City, and made other investigatory efforts, concluding that the DHS charges against Kargar should be dropped.<sup>28</sup> Yet, she was not permitted by the trial judge to testify as an expert in the dismissal hearing or even to explain why the DHS had dismissed the charges.<sup>29</sup> The offer of proof indicated that the case worker would have testified that DHS had dropped the charges after concluding that Rahmadan was not in jeopardy and had not suffered any harm.<sup>30</sup> Kargar explained that, consistent with his Islamic culture, by kissing Rahmadan's penis—a body part that is “not the holiest or cleanest”—he was showing how much he truly loved his son.<sup>31</sup>

Further cultural evidence produced at the sentencing stage included testimony from an Ahman, or priest, in the Maine Muslim community who stated that the conduct for which Kargar had been convicted was deemed innocent, non-sexual, and appropriate in Islamic Afghan culture.<sup>32</sup> The Ahman testified that, according to the Muslim religion, kissing a child's penis is not considered a crime; in fact, he

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26. See Appellant's Brief at 11, *Kargar* (No. 7719, CUM-95-300).

27. See *Kargar*, 679 A.2d at 83.

28. See Appellant's Brief at 11, *Kargar* (No. 7719, CUM-95-300).

29. See *id.* at 11-12.

30. See *id.* at 12.

31. *Kargar*, 679 A.2d at 83 n.3.

32. See Appellant's Brief at 13, *Kargar* (No. 7719, CUM-95-300).

stated, fathers are expected to kiss a child "all over for the kindness of the child."<sup>33</sup> The Ahman further testified that "it's part of our culture [and] the country [where] we grew up. It's not a crime."<sup>34</sup> The guardian *ad litem* also testified that he had investigated the family's culture, contacted the Muslims, and learned that the conduct was "no problem."<sup>35</sup>

Related to this cultural evidence were the findings of the investigating social workers, guardian *ad litem*, and psychiatrist, who essentially concluded that any harm suffered by the Kargar children was caused by their court-ordered separation from their father while charges were pending against him rather than by any sexual conduct on his part.<sup>36</sup>

### C. The Trial Court's Ruling

The Superior Court, acting also as the fact finder, found Kargar guilty and rejected the motion to dismiss.<sup>37</sup> The court found that Kargar had in fact had mouth-to-penis contact with his child.<sup>38</sup> The court also concluded that Kargar had not had a culpable state of mind, nor sought sexual gratification when engaging in these acts. Nevertheless, the court held that his state of mind was irrelevant to the issue of guilt because (a) neither a culpable state of mind nor the purpose of sexual gratification was an element of the crime; and (b) "the innocent nature of the conduct" was not relevant to a *de minimis* inquiry.<sup>39</sup> Similarly, the trial court rejected the argument that lack of harm to the child was relevant to determining whether the *de minimis* statute applied, because under the gross sexual act statute, harm was conclusively assumed by the act itself.<sup>40</sup> Finally, the court concluded that culture was also irrelevant to the *de minimis* inquiry, stating: "I don't think the legislature intended that there be a variable scale applicable to people differently depending upon their

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33. *Id.* at 14.

34. *Id.*

35. *Id.* at 13.

36. *See id.* As a condition of his release for the two years the charges were pending against him, Kargar was not permitted to live with his children. *See id.*

37. *See State v. Kargar*, 679 A.2d 81, 83 (Me. 1996).

38. *See Appellant's Brief at 14, Kargar* (No. 7719, CUM-95-300).

39. *Id.* at 15.

40. *See id.*

origin . . . [.] uniformity of application of laws is one of the principles that is essential to the even application of the law."<sup>41</sup>

At the sentencing stage, the court sentenced Kargar to concurrent terms of eighteen months in prison on both counts, suspended those terms, and placed him on probation for three years with the condition that he learn English.<sup>42</sup> In so sentencing him, the trial court repeated its factual finding that the defendant's conduct was not for purposes of sexual gratification; that no harm had occurred to Rahmadan, and that any sentence of jail time would "send the wrong message."<sup>43</sup> The trial court concluded that the "disruption" he and his family had "suffered as a result of [the court] proceedings [was] punishment enough."<sup>44</sup>

Although Kargar thus suffered no prison time, under federal law the two convictions exposed him to automatic deportation.<sup>45</sup> Kargar also had to register his address with police for the next fifteen years as a convicted sex offender<sup>46</sup> and was restricted from attaining various licenses and privileges.<sup>47</sup>

#### D. *The Appellate Ruling*

On appeal, the Maine Supreme Judicial Court, sitting as the Law Court, unanimously vacated the conviction and instructed the trial court to dismiss the prosecution.<sup>48</sup> The Law Court found, as a matter of law, that the trial court had erred in finding "culture, lack of harm, and [Kargar's]

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41. *Id.*

42. See Appellee's Brief at 1, *State v. Kargar*,

79 A.2d 81 (Me. 1996) (No. \_\_\_ CUM-95-300).

43. See Appellant's Brief at 15-16, *Kargar* (No. 7719, CUM-95-300).

44. See *id.* at 16.

45. See 8 U.S.C. § 1227(a)(2)(A)(ii) (1998) (originally enacted as § 1251(a)(2)(A)(ii)(1994).

46. See ME. REV. STAT. ANN. tit. 34-A § 11003(1) (West Supp. 1997).

47. See, e.g., ME. REV. STAT. ANN. tit. 15 § 393(1)(A) (West Supp. 1997) (prohibiting possession of firearms for persons convicted of a crime that is punishable by imprisonment for one year or more); ME. REV. STAT. ANN. tit. 12 § 7071(9) (West 1994) (making person convicted of a crime that is punishable by imprisonment for one year or more ineligible for a license to hunt with a firearm); ME. REV. STAT. ANN. tit. 32 § 9405(1-A)(D) (West 1983) (making person convicted of a crime that is punishable by imprisonment for one year or more ineligible for a private security guard license).

48. See *State v. Kargar*, 679 A.2d 81, 86 (Me. 1996).

innocent state of mind irrelevant to [the] *de minimis* analysis."<sup>49</sup> Tacitly finding that any ruling not to dismiss would be an abuse of discretion, the court remanded the case with instructions to dismiss the prosecution.<sup>50</sup>

Noting that the purpose of the *de minimis* statute is to "introduce[] a desirable degree of flexibility in the administration of the law,"<sup>51</sup> the Law Court asserted that the statute's language expressly requires the trial court to view the defendant's conduct with "regard to the nature of the conduct alleged and the nature of the attendant circumstances," and thus necessarily warrants case-specific analysis.<sup>52</sup>

Pointing out that the authors of the Model Penal Code justified the statute by recognizing that "courts should have the 'power to discharge without conviction, persons who have committed acts which, though amounting in law to crimes, do not under the circumstances involve any moral turpitude,'"<sup>53</sup> the Law Court agreed with decisions from other jurisdictions that included as relevant to the *de minimis* analysis such factors as the background, experience, and character of the defendant which may indicate whether he knew or ought to have known of the illegality; the knowledge of the defendant of the consequences to be incurred upon violation of the statute; the circumstances concerning the offense; the resulting harm or evil, if any, caused or threatened by the infraction; the probable impact of the violation upon the community; the seriousness of the infraction in terms of punishment, bearing in mind that punishment can be suspended; mitigating circumstances as to the offender; possible improper motives of the complainant or prosecutor; and any other data which may reveal the nature and degree of the culpability in the offense committed by the defendant.<sup>54</sup>

Applying this law and these factors to the facts in *Kargar*, the court concluded that the third prong of the *de minimis* statute, calling for dismissal when the "admittedly

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49. *See id.* at 83.

50. *See id.* at 86.

51. *Id.* at 83 (quoting ME. REV. STAT. ANN. tit. 17-A, § 12 cmt. (West 1983)).

52. *Id.* at 83 (quoting ME. REV. STAT. ANN. tit. 17-A, § 12(1) (West 1983)).

53. *Id.* at 84 (quoting MODEL PENAL CODE § 2.12 cmt. at 400 (1985)).

54. *See State v. Kargar*, 679 A.2d 81, 84 (quoting *State v. Smith*, 480 A.2d 236, 238-39 (N. J. Super. 1984) (citing *State v. Park*, 525 P.2d 586, 591 (Haw. 1974))).

criminal conduct" of a defendant was not "envisioned by the Legislature when it defined the crime," applied in this case.<sup>55</sup> In making this determination, the court reviewed the legislative history of Maine's gross sexual assault statute, which suggested that the statute was not meant to apply to "innocent" conduct.<sup>56</sup> The court found that the type of "'innocent' touching such as occurred in this case" had "not forever been recognized as inherently criminal by our own law."<sup>57</sup>

As to Kargar's background, the court concluded that the record reflected no real dispute that the conduct for which he had been convicted was "accepted practice in his culture."<sup>58</sup> This factor, along with the lack of any "sexual" component to Kargar's conduct, the absence of victim impact, and the severe consequences of conviction, including registration as a sex offender<sup>59</sup> and possible deportation,<sup>60</sup> were all relevant to the *de minimis* analysis and militated in favor of dismissal.<sup>61</sup> In sum, to avoid "injustice," the court held that society's difficulty in separating "Kargar's conduct from our notions of sexual abuse . . . should not result in a felony conviction in this case."<sup>62</sup>

## II. STATUTORY OR COMMON LAW POWER TO DISMISS PROSECUTION ON CULTURAL GROUNDS

*Kargar* teaches that a criminal defendant's culture is relevant when determining whether to dismiss a prosecution under a *de minimis* statute. Indeed, "culture" cuts across many of the factors acknowledged by the Court

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55. *Id.* (citing ME. REV. STAT. ANN. tit. 17-A, § 12(1)(C) (West 1983)).

56. *Id.* at 84-85 (citing L.D. 1386, Statement of Fact (112th Legis. 1985)) (In discussing a change in the statute broadening the definition of the type of sexual act criminalized as gross sexual conduct, ME. REV. STAT. ANN. tit. 17-A, § 251(1)(C)(1) (West 1983) (current version at ME. REV. STAT. ANN. tit. 17-A, § 251(1)(C)(1) (Supp. 1998)), the Maine Legislature stated that the element of sexual gratification, which had been included in the statute prior to 1985, could be removed because, "given the physical contacts described, no concern exists for excluding 'innocent' contacts.").

57. *Id.*

58. *Id.* at 85.

59. See ME. REV. STAT. ANN. tit. 34-A § 11003 (Supp. 1998).

60. See 8 U.S.C. § 1251(a)(2)(A)(i) (1994).

61. *State v. Kargar*, 679 A.2d 81, 85 (Me. 1996).

62. *Id.* at 85-86.

and the drafters of the Model Penal Code as relevant under a *de minimis* analysis. For example, culture can explain why a particular defendant does not know that his or her action is a crime or does not recognize the consequences that will be incurred if the law is violated. Actual knowledge that particular conduct violates the law is deemed an important factor under the *de minimis* analysis because, among other reasons, the defense is *not* designed to permit jury or judge nullification. As the Model Penal Code states, situations requiring a *de minimis* analysis will arise when "the customs that control the conduct of a particular racial or social group are at variance with those that predominate in the community that motivated the legislation in question."<sup>63</sup> Although the efficacy of such legislation may be open to question, the Code makes clear that it is not appropriate for the court or, by implication, the jury to "nullify laws with which particular segments of the community disagree. Relief in such cases lies in the legislature."<sup>64</sup> Culture also relates to "the nature of the attendant circumstances"<sup>65</sup> surrounding the offense, and can affect the degree of harm. In *Kargar*, for example, one reason why Rahmadan, the alleged "victim," suffered no adverse impact from his father's conduct was because it was not deemed wrong in his Muslim community. Finally, the potential gravity of the consequences of a conviction can be severely increased by the defendant's immigrant status under federal deportation laws.

The fact that a defendant's culture can be relevant under multiple factors examined in a *de minimis* analysis demonstrates that culture has a profound connection with our sense of justice in general. The *de minimis* statute constitutes an attempt to create a catchall codification meant to avoid the injustice of punishing defendants for "innocent" conduct. That culture can trigger most of the factors in a *de minimis* analysis shows the close relationship between culture and our understanding of

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63. See MODEL PENAL CODE § 2.12 cmt. at 403 (1985).

64. *Id.* Translating this factor—knowledge that the conduct is illegal—into the parlance of cultural defense, some commentators distinguish between a "cognitive" cultural defense, applying when the defendant does not realize that his or her actions are a crime, and a "volitional" cultural defense, where the defendant is aware of the illegality of his or her act. See Fischer, *supra* note 11, at 669-70.

65. MODEL PENAL CODE sec 2.12.



guilt. This relationship is demonstrated even more explicitly under statutes and rules similar to the *de minimis* statute, which also create a safety valve to offload otherwise criminal conduct from prosecution when the individual circumstances warrant. In addition to the five jurisdictions that have adopted versions of the Model Penal Code's *de minimis* statute,<sup>66</sup> other states have enacted "interests of justice" statutes or rules of procedure which can be used in a similar manner by a court to dismiss a prosecution.<sup>67</sup>

Trial courts in these "interests of justice" jurisdictions may dismiss prosecutions against the wishes of the prosecutor in cases when "compelling circumstances require such a result."<sup>68</sup> In deciding whether to take such a step, the trial court considers factors such as "the seriousness and circumstances of the charged offense," the defendant's background, "the purpose and effect of imposing a sentence authorized by the offense," "the impact of the dismissal on public confidence in the judicial system or on the safety and welfare of the community in the event the defendant is guilty," and any other relevant information indicating that "conviction would serve no useful purpose."<sup>69</sup> Most jurisdictions then apply an abuse of discretion standard to any review of the trial court's decision to dismiss a prosecution.<sup>70</sup>

In considering these factors, the trial court is, in effect, weighing "the respective interests of the defendant, the complainant, and the community at large,"<sup>71</sup> providing a mechanism for deviating from the normal balancing result

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66. See 9 GUAM CODE ANN. §7.67 (1996); HAW. REV. STAT. § 702-236 (1993); ME. REV. STAT. tit. 17-A, § 12 (West 1983); N.J. STAT. ANN. § 2C: 2-11 (West 1995); 18 PA. CONS. STAT. ANN. § 312 (West 1998).

67. See ALASKA R. CRIM. P. 43(c); CAL. PENAL CODE § 1385 (West 1982) (amended 1986); IDAHO R. CRIM. P. 48(a)(2); IOWA R. CRIM. P. 27(1); MINN. STAT. ANN. § 631.21 (West 1983) (current version at MINN. STAT. ANN. § 631.21 (Supp. 1999)); MONT. CODE ANN. § 46-13-401; N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1993); OKLA. STAT. tit. 22, § 815 (1998); OR. REV. STAT. tit. 14, § 135.755 (1997); UTAH R. CRIM. P. 25; VT. R. CRIM. P. 48(b)(2); WASH. REV. COD. tit. 10, 8.3 (West 1990).

68. *State v. Sauve*, 666 A.2d 1164, 1167 (Vt. 1995).

69. *Id.* at 1168.

70. See *id.* at 1166-67. But see *State v. Swenson*, 809 P.2d 1185, 1187 (Idaho Ct. App. 1991) (identifying the standard as "whether the trial court erred as a matter of law"); *State v. Blackwell*, 845 P.2d 1017, 1022 (Wash. 1993) (requiring a showing of arbitrary action or government misconduct before a trial court may dismiss a prosecution in the interests of justice).

71. *Sauve*, 666 A.2d at 1168.

in individual cases when our generalized notions of justice require it. Such "interests of justice" statutes or rules seem to be as available for considering cultural factors as *de minimis* statutes. Both mechanisms are designed to act as safety valves with which to evade strict application of the law when factors not normally considered in the criminal judicial process appear relevant in individual situations.

For example, in dismissing cases pursuant to a longstanding "interests of justice" statute, New York courts did not focus solely on the legal or factual merits of the charge, or the guilt or innocence of the defendant, because such dismissals are based on broader principles of justice.<sup>72</sup> Stating that the purpose of the statute was "to give a court power in appropriate but rare circumstances to allow the letter of the law gracefully and charitably to succumb to the spirit of justice,"<sup>73</sup> the court in *People v. Davis*<sup>74</sup> dismissed a drug prosecution against a twenty-year-old defendant aspiring to become a doctor, because his "character and potential" warranted such relief.<sup>75</sup> To support its ruling, the court stated, "The criminal law is at best an imperfect instrument [that] . . . occasionally catches in its net one who, should he be convicted of an offense, would suffer more grievously than justice would require, taking into consideration the nature of his offense, his background, and the possible future consequences of such conviction."<sup>76</sup> In this way, the court employed the statute as a safety valve, much as the more modern New York Criminal Procedure Law, Section 210.40, has continued to be applied.<sup>77</sup>

Whether a court can dismiss an action based on these *de minimis* or "interests of justice" principles in the absence of a statute or rule is more problematic. New York's interest of justice statute has been traced to the common law writ of

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72. See, e.g., *People v. Davis*, 286 N.Y.S.2d 396, 398-99 (N.Y. Sup. Ct. 1967) (granting a furtherance of justice dismissal to a twenty-year-old college student, found in possession of an ounce of marijuana, because of his most exemplary moral background and "unblemished record").

73. *Id.* at 400.

74. 286 N.Y.S. 2d 396 (N.Y. Sup. Ct. 1967).

75. *Id.* at 399.

76. *Id.* at 400.

77. When New York's Criminal Procedure Law superseded the Code of Criminal Procedure, section 671 was renumbered as section 210.40. See generally John F. Wirenius, *A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175 (1994).

*nolle prosequi*.<sup>78</sup> The writ of *nolle prosequi*, however, was not originally used to permit prosecutors to dismiss indictments in the furtherance of justice, but rather "to dispose of technically imperfect proceedings instituted by the Crown, and to put a stop to oppressive, but technically impeccable, proceedings instituted by private prosecutors."<sup>79</sup> Later, in 1881, the New York Legislature adopted Section 671 of the Code of Criminal Procedure which provided that "the court may, . . . of its own motion, . . . and in furtherance of justice, order an action, after indictment, to be dismissed."<sup>80</sup> In so doing, the legislature removed the power to dismiss from the district attorney and vested it in the courts, thus expanding considerably the traditional uses of the common law *nolle prosequi*.<sup>81</sup> Seen from an historical point of view, then, the writ appears to have been lodged solely in the hands of the prosecutor; expansion of that common law doctrine to give courts a role would seem to require statutory authority.<sup>82</sup>

*De minimis* or "interests of justice" statutes reflect a legislative will to recognize judicial authority to oversee executive prosecutorial discretion—one example of a checks-and-balances framework with which to achieve ultimate justice. Each branch of the government has a role in achieving justice. The legislature writes the law. The prosecutor enforces the law. The judiciary is the final arbiter as to whether the law has been followed. One threshold question presented in determining whether a *de minimis* analysis can apply even in jurisdictions in which *de minimis* or "interests of justice" statutes have not been enacted is whether judicial review over the prosecutor's determination to pursue a conviction is appropriate in our three-branch governmental system. The prosecutor is supposed to examine the factors recognized in the *de minimis* and "interests of justice" statutes and case law. He or she is

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78. See *id.* at 176-78.

79. *Id.* at 178 (quoting *Nolle Prosequi*, 1958 CRIM. L. REV. 573, 577).

80. *Id.* (quoting N.Y. CODE OF CRIM. PROC. § 671 (Weed, Parsons & Co. 1881)).

81. See *id.*

82. See *Commonwealth v. Kindness*, 371 A.2d 1346, 1349 (Pa. Commw. Ct. 1977) ("The authorities are virtually unanimous that the historical power to 'nol pros' belonged at common law solely to the Attorney General and remains an exclusive prosecutorial power in the absence of a state constitutional or statutory provision to the contrary").

charged with the duty to consider the spirit as well as the letter of the law and to decline to pursue convictions in some situations when the conduct of the potential defendant technically falls within the purview of a criminal statute.<sup>83</sup> Generally speaking, however, the prosecutor has been left with unfettered discretion in determining whether justice would be served by pursuing a prosecution.<sup>84</sup> At least in the absence of a statute or court rule authorized by statute, allowing judicial review of a decision to prosecute or review under the common law or even constitutional precepts is narrowly proscribed, if not prohibited.<sup>85</sup>

83. The Supreme Court has stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1934).

84. See, e.g., Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (Burger, J.). "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions." *Id.* at 481 (citing United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965)).

85. Judicial review of decisions to prosecute has been allowed only when suspect classification—e.g., race or religion—is involved. See *United States v. Armstrong*, 517 U.S. 456 (1996). This exception to the general rule, at first blush, conjures up questions as to whether "culture" would fall into the exception; the connection between "race," "religion," and "culture" is obvious. See also Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 537 (1995) (suggesting that EEOC guidelines use ancestry to define white, black, and Asian/Pacific Islander classifications while using culture or national origin, regardless of ancestry, for Hispanic Classifications); Roy L. Brooks, *Race as an Under-inclusive and Over-inclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 9-10, 12 (1994) (discussing how race can be defined in phenotypical terms or, for civil rights purposes, based on "cultural oppression or alienation").

Even if culture were treated similarly to race for the purpose of identifying the parameters of a selective prosecution defense, the exception would not provide assistance to those seeking to advance a cultural defense to criminal prosecution. The suspect class exception to complete prosecutorial discretion is applied to ensure that prosecutors do not discriminate against minorities—that they treat minority defendants as equal to the general populace. The concern is that the prosecutor will choose to pursue a minority defendant for a crime that he or she would not prosecute were the defendant white. See *Armstrong*, 517 U.S. at 465 (to prove a selective prosecution case, the defendant must show that

Conversely, once the decision to prosecute has been made and charges filed, judicial oversight commences. Logically, at this point, the court's power to dismiss a prosecution would increase.<sup>86</sup> Perhaps for this reason, among others, courts have been careful to construe statutes that remove or limit judicial power over imposition of punishment in a way that retains the courts' ability to recognize fundamental principles of fairness.<sup>87</sup> For example, courts recognize that the legislature can—within the constitutional constraints against cruel and unusual punishment—circumscribe their authority in the area of sentencing.<sup>88</sup> Judges can, however, construe and have construed penalty statutes to leave them discretion when individual circumstances warrant.<sup>89</sup>

Judicial control of prosecutions is not limited to the punishment stage. The judicial power of statutory inter-

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similarly situated persons of another race were not prosecuted). In contrast, a cultural defense does not seek to prevent discrimination in the ordinary sense. Rather, such a defense seeks to have the minority treated *differently* from the majority—to have the prosecutor *forego* prosecution when the average defendant *would* be prosecuted. For this reason, those espousing a cultural defense cannot look toward conventional anti-discrimination jurisprudence as support their cause.

Looking to affirmative action precedent for analogies provides no support for a cultural defense for similar reasons. Although affirmative action does, on one level, seek to treat minorities differently from the majority in a positive way by providing benefits unavailable to the equivalent non-minority member, such action is permitted in order to compensate for past discrimination. *See* Bush v. Vera, 517 U.S. 952 (1996); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 286 (1986). Again, the focus is on leveling the playing field, not allowing for different fields for those with different backgrounds.

86. *See* *People v. Tenorio*, 473 P.2d 993, 996 (Cal. 1970) (stating, "When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.").

87. *See* *Koon v. United States*, 518 U.S. 81, 94 (1996) (describing the federal courts' ability to depart from sentencing guidelines); *People v. The Superior Court of San Diego County*, 917 P.2d 628 (Cal. 1996) (holding that California's "three-strike" law did not abrogate the state's "interests of justice" statute, so that courts retained their discretion to dismiss a prior felony conviction when imposing sentence). *But see* *Riggs v. California*, 119 S. Ct. 890 (1999) (recognizing that the denied petition for certiorari raised a serious question about the application of California's "three-strikes" law to petty offenses).

88. *See, e.g., Keeler v. Superior Court*, 470 P. 2d 617 (Cal. 1970).

89. *See, e.g., Koon*, 518 U.S. at 113 ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge.").

pretation can result not merely in tempered sentences, but also in outright dismissals. Courts can reject convictions, even if the offense technically falls within the elements of the crime under the rules of statutory construction militating against absurd results,<sup>90</sup> and in favor of common sense.<sup>91</sup> These rules, if broadly and aggressively applied, could parallel results from application of a *de minimis* statute.<sup>92</sup> The court in *Kargar*, for example, concluded that the gross sexual assault statute, whatever its technical language, was not intended to criminalize non-sexual conduct. Kargar's conduct was then deemed non-sexual by virtue of his cultural background (as well as by other factors, such as the nature of the conduct itself). In a Hawaiian case, that state's Supreme Court recognized a similar limitation on a sex offense statute, relying not on the state's *de minimis* statute, but a common sense interpretation of the law.<sup>93</sup> The Supreme Court of Hawaii limited a statute criminalizing "any intrusion or penetration, however slight, of any part of a person's body, or of any object, into the genital opening of another person" to prohibiting only "coitus in the ordinary sense and those intrusions or penetrations of another person's body that are considered 'inherently and essentially evil.'"<sup>94</sup> The court found that it could so limit the construction of the statute because a "literal application" of the statute "would encompass, as defendant fears, some innocent acts," and "we are not bound to accept such consequences."<sup>95</sup>

In sum, use of a *de minimis* analysis, whether based on a statute or common law rules against absurd results, provides one avenue to channel the cultural defense into a viable legal argument. One problem with a *de minimis*

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90. See 2A NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 46.07 (5th ed. 1992).

91. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 22(d), at 109 (1986).

92. One purpose of the *de minimis* statute is to avoid absurdity and to apply a rule of reason. See *State v. Sorge*, 591 A.2d 1382, 1385 (N.J. Super. Ct. Law Div. 1991); Model Penal Code §2.12, cmt. at 404. The Comment accompanying the Model Penal Code's adoption of the *de minimis* statute expressly states that the statute could be considered as "an application of Blackstone's Tenth Rule, that a statute should not be interpreted to produce a ludicrous result." *Id.* §2.12, cmt. at 404 n.18 (citing 1 W. BLACKSTONE, COMMENTARIES \*91).

93. See *State v. Torres*, 660 P.2d 522, 527 (Haw. 1983).

94. *Id.* at 525-26.

95. *Id.* at 526.

approach as the exclusive avenue to treat cultural defenses, however, is its lack of regularity. By definition, a *de minimis* statute is a catchall, necessarily requiring flexibility and a certain ambiguity. The factors recognized as relevant to a *de minimis* analysis are broad, not necessarily conclusive, and can be weighed by different judges in different ways. One judge's proper exercise of discretion is another judge's impermissible arbitrary act.<sup>96</sup> If a discretionary approach were sufficient, there would be no reason to review the prosecutor's exercise of discretion in the first place, nor would there have been any impetus to create sentencing guidelines. Hence, the next relevant question is whether any meat can be put on the bones of a *de minimis* approach; that is, can any substantive limits or guidance be injected into a catchall avenue for relief? If so, how does culture fit into these substantive rules?

### III. THE CONSTITUTIONAL ARGUMENTS SUPPORTING CONSIDERATION OF CULTURAL FACTORS

On appeal, in addition to reliance on the *de minimis* statute, Kargar also claimed that his conviction violated his constitutional rights to due process, freedom of religion, parental autonomy, and privacy.<sup>97</sup> These alternative avenues for application of a cultural defense provide further guidance regarding the role culture should play in determining criminal guilt.

#### A. Due Process

The Selden quotation at the beginning of this article, stating that ignorance of the law is no excuse or defense,<sup>98</sup> is a black-letter principle of law cited time and again.<sup>99</sup>

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96. Some jurisdictions have altered the Model Penal Code's "shall dismiss" to the more permissive "may dismiss," as a way of granting the court broader discretion. See HAW. REV. STAT. § 702-236 (1996); ME. REV. STAT. tit. 17-A § 12 (West 1983); N.J. STAT. ANN. § 2C: 2-11 (West 1997).

97. Given its decision to reverse the conviction on the basis of the *de minimis* statute, the Maine Supreme Judicial Court did not address Kargar's constitutional arguments.

98. JOHN SELDEN, TABLE TALK 65 (1689) (changing original to use modern spelling).

99. See, e.g., *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

Equally important, however, are the words that follow the oft-cited quote: "Ignorance of the law excuses no man; *not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him.*"<sup>100</sup> Hence, ignorance of the law was originally rejected as a defense not because it is equitable or just not to consider this factor, but because of the practical difficulty of its application. Thus, although intent is not always an element in a criminal statute, the requirement of a mens rea remains "the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."<sup>101</sup>

In a series of decisions, the Supreme Court has suggested or held that, in some circumstances, ignorance of the law or lack of intent<sup>102</sup> must be a defense in order to avoid violation of the Due Process Clause.<sup>103</sup> This body of law has been summarized as follows:

[W]here a criminal statute prohibits and punishes seemingly innocent or innocuous conduct that does not in itself furnish grounds to allow the presumption that defendant knew his actions

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100. SELDEN, *supra* note 98, at 65 (emphasis added).

101. United States v. Gypsum, 438 U.S. 422, 436 (1978); Dennis v. United States, 341 U.S. 494, 500 (1951); see also Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 636 (1993) (citations omitted) (stating, "By the time of Coke, the maxim 'actus non facit reum nisi mens sit rea' (an act does not make one guilty unless his mind is guilty) had become well ingrained in the common law, and it remains a central precept of Anglo-American criminal law today.").

102. There are different types of intent, *e.g.*, general and specific, and different strata of *mens rea*. See Liparota v. United States, 471 U.S. 419, 422 n.5 (1985). For the purposes of this analysis, the focus is on knowledge of unlawfulness.

103. See *Morrisette v. United States*, 342 U.S. 246, 249-58 (1952) (construing a statute without a mens rea element to include such an element because of the legal tradition of requiring intent for serious crimes); *Lambert v. California*, 355 U.S. 225, 227 (1957) (holding that a municipal ordinance making it a crime to be present in Los Angeles without registering with the police violated the Due Process Clause when the defendant had no knowledge of his duty to register); *United States v. Freed*, 401 U.S. 601, 608 (1971) (identifying two ends of a spectrum – public welfare laws that need no mens rea, and the passive lack of registration in *Lambert* that requires knowledge of unlawfulness). More recently, without invoking the Due Process Clause, the Supreme Court has continued to construe criminal statutes to include intent elements based on the longstanding common law principle favoring inclusion of a mens rea. See, *e.g.*, *Staples v. United States*, 511 U.S. 600 (1994); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Liparota v. United States*, 471 U.S. 419 (1985).



must be wrongful, conviction without some other, extraneous proof of blameworthiness or culpable mental state is forbidden by the Due Process Clause.<sup>104</sup>

In contrast, if the act is not innocuous on its face, the State can criminalize the conduct absent intent *if* the State's purpose is to protect public health and safety *and* if there was no common law background to the crime that included an intent element.<sup>105</sup> Public health and safety offenses that dispense with a *mens rea* requirement are usually not positive aggressions or invasions, which the common law dealt with most often, but are rather in the nature of neglect.<sup>106</sup> Additionally, the penalties under such public welfare-neglect laws "commonly are relatively small" and involve no "grave damage to an offender's reputation."<sup>107</sup> Conversely, if the penalty is severe and the criminal nature of the conduct is not evident on its face, the statute must have an intent element or it will violate the Due Process Clause. For example, in *Lambert v. California*,<sup>108</sup> the Court struck down a section of the Los Angeles Municipal Code that made it a criminal offense for a person convicted of an offense punishable as a felony in California to be present in Los Angeles without registering with the police. Such criminalization of otherwise passive activity, the Court held, violated the Due Process Clause.<sup>109</sup>

What does this body of law teach us about the role of culture as a defense to criminal conviction? In many ways, these due process requirements echo the *de minimis* analysis. Lack of intent or knowledge of criminality, for example, is required. The severity of the punishment is also a factor.<sup>110</sup>

One relevant question to ask when applying a due process analysis is what standard is applied to determine

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104. *Stanley v. Turner*, 6 F.3d 399, 404 (6th Cir. 1993).

105. *See id.*

106. *See Morrisette*, 342 U.S. at 255-56.

107. *Id.* *See also Staples*, 511 U.S. at 616 ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*").

108. 355 U.S. 225 (1957).

109. *See id.* at 227.

110. *See Staples v. United States*, 511 U.S. 600, 616 (1994) (emphasizing the harsh penalties attaching to violations of the statute at issue as a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea*").

whether the defendant acted reasonably—for example, whether he or she “should have” known that the conduct was illegal. The Due Process Clause is implicated when harsh penalties are attached to certain acts, absent a *mens rea* element, because the defendant has been given inadequate notice of the wrongfulness of his or her behavior.<sup>111</sup> In *The Common Law*, Oliver Wendell Holmes wrote: “[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.”<sup>112</sup> The basic question raised when analyzing this concept in a cultural defense context is how to define the defendant’s community. Similarly, the Supreme Court has noted that knowledge of the law becomes an element of the crime in situations—such as certain tax violations—when the law is so complex that it is “difficult for the average citizen to know and comprehend” his or her duties.<sup>113</sup> Again, how do we define the “average citizen”? If the court looks only at Anglo-American tradition, that is, whether intent was an element in the common law, or if the court applies an objective “should have known” standard in the context of a person educated in Western traditions, then the impact of culture is minimized or, more correctly, the Anglo-American culture is imposed on others.

With no clear answer to this “should have known” conundrum, other principles may prove useful in determining when culture should be considered. The Supreme Court’s reference to positive aggressions or invasions, for example, suggests that a violent act is more likely not to be excused on the basis of cultural differences.<sup>114</sup> Applying this standard, a cultural defense raised by a Hmong man who had engaged in “marriage by capture”<sup>115</sup> would be unsuc-

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111. See *Lambert v. California*, 355 U.S. 225, 228 (1957); see also *Liparota v. United States*, 471 U.S. 419, 426-27 (1985) (holding that a food stamp law required a *mens rea* element in part because of the application of the principle that criminal statutes should be resolved in favor of leniency; application of such a rule “ensures that criminal statutes will provide fair warning concerning conduct rendered illegal”).

112. OLIVER WENDELL HOLMES, *THE COMMON LAW* 50 (1881).

113. *Cheek v. United States* 498 U.S. 192, 199-200 (1991).

114. See *State of New Jersey v. Bazin*, 912 F. Supp. 106, 115 (D.N.J. 1995) (“[D]irect intentional physical attack upon another . . . should not be classified as trivial . . . even under an expansive view of the scope of the *de minimis* statute” (quoting *State v. Downey*, 576 A.2d 945 (N.J. Super. Law Div. 1988))).

115. In marriage by capture, a Hmong man engages in a courting ritual that

cessful because he commits the violent act of rape. Under existing legal standards, however, the Hmong man will not be convicted if he can establish that he believed that the woman engaged in sexual intercourse with him voluntarily because, in the United States, consent is a defense to rape. He might argue, for example, that, to a Hmong man, a Hmong woman's verbal protests would demonstrate consent even though, to a Westerner, such actions would clearly signal resistance. Because the issue of consent is subjective under Western tradition, examined from the point of view of the individual defendant,<sup>116</sup> existing Anglo-American law

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includes taking his prospective wife into his family home and keeping her there for three days to consummate the marriage. See Deirdre Evans-Pritchard and Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISCIPLINARY L.J. 1, 8 (1995) [hereinafter *Marriage by Capture*]. In Hmong language, "marriage by capture" or "marriage by abduction" is called "zij poj niam"; such marriages are also known as "bride-theft" or "tshoob zij." See *id.* at 14. Another common marriage practice among the Hmong, called "marriage by elopement," occurs when a woman goes willingly with a man. See *id.* While being held captive, the woman is supposed to protest that she is not ready for sex in order to prove her virtue. Sometimes a Hmong woman will file rape charges against the man following such an episode, claiming her protests were genuine and not part of a courting ritual. See *id.*

116. See generally John H. Biebel, *I Thought She Said Yes: Sexual Assault in England and America*, 19 SUFFOLK TRANSNAT'L L. REV. 153, 155 (1995) (discussing English and American courts' willingness to make "mistake of consent" defenses available to defendants in rape trials). In Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L. J. 55, 74 (1952), cited approvingly in MODEL PENAL CODE § 213.1 commentary at 302-03 (Official Draft and Revised Comments 1980), the author points out that reliance solely on a woman's subjective opposition to his sexual act "conflict[s] with a vital community policy that allows individuals to rely, as a guide to their own conduct, on the behavior of others." Because "[m]any areas of the law permit reliance upon the apparent meaning of another's words or actions . . . , where a woman demonstrates overt signs of acquiescence to sexual advances, consummation of the act should not jeopardize the man because of her unexpressed reservation of consent." *Id.* In such instances, as with the Hmong man who believes a woman's overt opposition to his sexual advances is part of a courting ritual actually indicating her consent, the "man is ignorant of the controlling fact which would brand his act rape—the woman's attitude of opposition." See *id.* Thus, states the author, "the policy of protecting reliance on the behavior of others should prevail over the demand for protection of the woman's right to withhold consent." *Id.* See also Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991) (asserting that the consent standard makes successful prosecution of acquaintance rape cases nearly impossible). But see Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 576 (1997) ("Individual state interpretations of critical terms, like force and

allows a violent defendant to avoid penalty based on his cultural background; the defendant's cultural background led him to believe that consent existed when, in fact, it did not. In this particular situation, therefore, the debate is not whether Anglo-American principles should be *expanded* to allow for cultural differences. Rather, the question is whether these existing principles should be changed and limited to *protect* victims of violent conduct. For example, in the case of *People v. Moua*,<sup>117</sup> twenty-three-year-old Kong Moua claimed he was following traditional Hmong marriage practices when he engaged in sexual intercourse with Seng Xiong, then nineteen.<sup>118</sup> Although both were born in Laos and moved to the United States as teenagers, Seng apparently had rejected the tradition of marriage by capture and believed that Kong had raped her.<sup>119</sup> At trial, Kong did not argue that he was unfamiliar with American law as an excuse or that he did not know that rape and kidnapping were crimes. What he did claim was that he believed he was marrying Seng according to Hmong tradition when he engaged in sexual intercourse with her.<sup>120</sup> Thus, Kong did not claim ignorance of the law, but rather, a reasonable mistake of fact as to whether Seng had consented to the sexual intercourse.<sup>121</sup>

Some feminist legal scholars point out the dangers to women and children of misusing patriarchal tradition in an attempt to excuse immigrant defendants from legal responsibility.<sup>122</sup> Although cultural evidence has been used at times to reduce sentences for immigrant women who have committed crimes, most often it has been used by

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consent, vary widely, and the defendant's state of mind can be, but is not always, critical.").

117. No. 815972-0 (Cal. Super. Ct. Feb. 17, 1985).

118. *Marriage by Capture*, *supra* note 115, at 9.

119. *See id.*

120. *See id.* at 22.

121. *See id.* at 23. Recognizing a mistake of fact as to consent would establish that Kong did not have the necessary intent, or mens rea, to commit the crime of rape. The public defender in the case did not, however, invoke a mistake of fact defense; Kong accepted a plea bargain included in which culture was considered as a mitigating factor during sentencing. *See id.* at 25-27. *See generally* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815 (1996) (exploring the transformation of the mistake of fact defense into a new rule of "equivocality").

122. *See, e.g.*, law review articles cited *supra* note 2.

immigrant men, particularly Asians, who abuse, rape, or kill immigrant women and children.<sup>123</sup> Courts are increasingly being asked to consider cultural factors as a defense or mitigating circumstance in cases involving domestic violence and child abuse, including the traditional practice of female circumcision, or female genital mutilation.<sup>124</sup> Examples of cultural evidence used in attempts to reduce charges or sentences are multiplying.<sup>125</sup> The debate involving the cultural defense thus becomes part of a larger debate about whether there is or should be "a unifying American culture that guides our institutions, including the justice system, or whether the United States is and should be a culturally pluralistic nation in all respects, including in the law."<sup>126</sup> Permitting sensitivity to a defendant's culture in applying laws to that individual demonstrates respect for multiculturalism and furthers the policy of providing individualized justice—and individualism, in turn, is an Anglo-American value. Advancing the causes of multiculturalism and individualized justice, however, may result in denying adequate protection to victims, often women and children, because their assailants often go free or serve relatively short sentences.<sup>127</sup> Thus, acceptance of the

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123. *See Restoring Hope or Tolerating Abuse?*, *supra* note 2, at 277-78.

124. Female genital mutilation is an operation currently being performed on young girls that involves the "incision and usually removal of part or all of the female external genitalia, which includes the clitoris, the clitoral prepuce, the labia majora and the labia minora." Lori Ann Larson, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?*, 17 WOMEN'S RTS. L. REP. 237, 238 (1996).

125. They include the following: a Houston insurance salesman, "accused of child abuse for hitting his misbehaving nephew and then putting pepper in the boy's abrasions" was sentenced to probation after arguing that this practice is an acceptable form of discipline in his native Nigeria; a Mexican woman from Los Angeles was ordered to seek counseling after being accused of child abuse for beating her 15-year-old son with a wooden spoon and biting him as punishment for taking money from her purse; in San Francisco and Los Angeles, two young Japanese mothers were allowed to plead guilty to manslaughter instead of standing trial for murder after killing their children because experts asserted that oyako-shinju, or parent-child suicide, is frequently practiced in Japan by wives humiliated by their husbands' infidelity; a Chinese immigrant, convicted of manslaughter for beating his wife to death with a hammer after she allegedly admitted to having an affair, was given five year's probation because the judge accepted the argument that "traditional Chinese notions about the shame of adultery had propelled him to violence." *When is Cultural Difference a Legal Defense?*, *supra* note 4, at A1.

126. Coleman, *supra* note 1, at 1094.

127. *See id.* at 1095.

cultural defense, which promotes the progressive cause of multiculturalism and the traditional protection of the individual, runs the risk of deterring another fundamental goal, the expansion of legal protections for some of the least powerful members of American society, women and children, and their own rights as individuals to be free from harm.<sup>128</sup>

Some commentators posit that the cultural defense rests on the false assumption that American law is "without a culture," thus ignoring the "fluid and shifting nature of American identity."<sup>129</sup> This raises the ultimate difficult issue of defining culture in the first place, either within the dominant American society or in any of the immigrant communities present in this country. Because differently situated people within a community experience "culture" differently, the admission of cultural evidence to exculpate one member of that community may result in prejudicing and further victimizing another member of the same community through the application of social norms that she believed no longer applied to her in this country. One commentator concludes that the way to reconcile the interests of multiculturalism and victims' rights is to use the cultural defense only when it serves the goal of antisubordination.<sup>130</sup> Under this view, by implication, the defense would only be available to female defendants.<sup>131</sup>

A similar debate has occurred in the international arena where the concept of universal human rights is pitted

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128. See *id.*

129. See, e.g., Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 61-62 (1994).

130. See *id.* at 63 ("[T]he value of antisubordination should be factored into the decision of whether or not to support use of the defense and that a commitment to antisubordination must entail a simultaneous recognition of material and descriptive oppression based on factors such as race, gender, immigrant status and national origin.").

131. Permitting women to assert cultural defenses may result in the perpetuation of negative stereotypes, e.g., Latina women as passive participants in crimes perpetrated by their husbands or male partners. See Kristen L. Holmquist, *Cultural Defense or False Stereotype? What Happens When Latina Defendants Collide with the Federal Sentencing Guidelines,* 12 BERKELEY WOMEN'S L.J. 45, 65 (1997). Women may be forced to either accept "harsh statutorily mandated sentences, or . . . embrace stereotype and play to a court's sympathy by presenting themselves as pawns of their husbands, naive and lacking in self-determination. By choosing the latter they shape themselves according to someone else's definition and mold their destinies, and the destinies of others like them, according to someone else's plan." *Id.*

against local cultural standards. The movement for international women's rights seeks to put pressure on countries to abandon customs and traditions that have resulted in the subjugation of women and violence toward women and children. To the extent that the adoption of the cultural defense is consistent with these goals, the conflict between multiculturalism and the protection of victims' rights may be minimized; to the extent that the adoption of the cultural defense further institutionalizes the subjugation of women and violence toward women and children, that conflict appears to defy resolution.

In the context of existing United States due process jurisprudence, a defendant would not appear to be able to invoke this constitutional protection successfully when charged with a violent crime unless he or she invoked some other common law or statutory defense, such as consent. Not only would Anglo-American common law normally condemn such behavior, but typically, lack of a *mens rea* is allowed only when the criminalized conduct is passive, as opposed to active,<sup>132</sup> or endangers safety and health.<sup>133</sup> Under the Due Process Clause, the injustice caused to the unknowing defendant can be weighed against the damage done to the victim.<sup>134</sup> The maxim that ignorance of the law is no excuse arose in the first instance to protect the community.<sup>135</sup> If lawmakers can require persons dealing with food, drugs, or dangerous instrumentalities to apprise themselves of the law or be subject to criminal penalties, requiring an actor within a jurisdiction to know that his or her acts are similarly criminal may impose no undue

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132. See *Stepniewski v. Gagnon*, 732 F.2d 567, 571 (7th Cir. 1984).

133. See *United States v. Park*, 421 U.S. 658, 672 (1975); *United States v. Freed*, 401 U.S. 601, 609 (1971).

134. See *United States v. Balint*, 258 U.S. 250, 253-54 (1922) (upholding a narcotics law: "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.").

135. See *United States v. Mancuso*, 420 F.2d 556, 559 n.5 (2d Cir. 1970) (stating, "Common law cases generally applied the maxim *ignorantia legis neminem excusat* ('ignorance of the law excuses no one') when mistake or ignorance of the existence of a criminal prohibition was urged. The sound reasoning behind such a conclusion was that the criminal law expressed general communal moral standards, and ignorance of their existence reflected in any case either recklessness or dangerousness to the community") (citing *Jerome Hall, Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1 (1957)).

burden on the actor, at least when the action is not passive, but inflicts violence upon a blameless victim.

### B. Religion, Parental Control, and Privacy

Another currently existing basis for a cultural defense can be found in the First Amendment<sup>136</sup> and its "penumbra."<sup>137</sup> Importantly, the argument that a defendant's conduct should not be deemed criminally wrong because of the protections bestowed or recognized in the Constitution for religious beliefs, parental rights, and privacy, differs from the values protected under the Due Process Clause or the *de minimis* analysis in one crucial respect: knowledge that one's conduct violates the law is *not* relevant to the inquiry.

1. *Religion* To the extent that "culture" equals "religion," it has been protected under the Free Exercise Clause of the First Amendment and, for a time, its statutory counterpart, the Religious Freedom Restoration Act of 1993.<sup>138</sup> Until struck down by the Supreme Court in *City of Boerne v. Flores*,<sup>139</sup> the Religious Freedom Restoration Act required strict scrutiny to be applied to a law neutral on its face if it adversely impacted religious activity.<sup>140</sup> Even in the absence of this statute, strict scrutiny is applied to laws neutral as to religion when those laws implicate parental rights.<sup>141</sup> Under the strict scrutiny standard, a law is invalid as applied "unless it is justified by a compelling interest and is narrowly tailored to advance that interest."<sup>142</sup> Hence, the relevant questions in analyzing the applicability of this standard in the context of a cultural defense include the following: (1) when is a "culture" a

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136. U.S. CONST. amend. I.

137. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

138. The Act was codified at 42 U.S.C. §§ 2000bb-2000bb4 (Supp. 1994).

139. 521 U.S. 507 (1997).

140. 42 U.S.C. § 2000bb-1(a), (b).

141. See *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872, 881 (1990) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

142. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (upholding church's challenge to city ordinances dealing with ritual slaughter of animals).



"religion" for the purposes of the Free Exercise Clause; and (2) what sort of "compelling interest" permits criminalization of religious activity? Little has been written about when and whether a "culture" will be viewed as a "religion" for the purposes of the Free Exercise Clause; the Supreme Court has simply required that Free Exercise claims "be rooted in religious belief."<sup>143</sup> Emphasizing the necessity of basing a Free Exercise claim on religion, the Court explained that a "subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, . . . would not rest on a religious basis"; rather, these beliefs would be "philosophical and personal rather than religious" and, as such, would "not rise to the demands of the Religion Clauses."<sup>144</sup> Thus, cases decided under the Free Exercise Clause have dealt with persons seeking to commit acts in the name of their religion<sup>145</sup> or to refrain from complying with some governmental requirement due to their religious beliefs.<sup>146</sup>

Some of these cases, however, have distinctly cultural overtones. In *Frank v. Alaska*,<sup>147</sup> for example, the Alaska Supreme Court held that the practice of killing moose, out of season, to serve at a funeral was based on the sincerely held religious tenets of a Central Alaskan Athabaskan man and, thus, was protected under the Free Exercise Clause.<sup>148</sup> The strongly worded dissent, however, pointed out that it was "merely desirable" to serve fresh moose meat at funerals, and that "[u]nless the use of fresh moose meat rises to the level of a cardinal religious principle, unless it is central to a religious observance, it cannot qualify as a practice protected" by the Free Exercise Clause.<sup>149</sup> The majority, nevertheless, granted an exemption for Athabaskan people from a state statute prohibiting unlawful transportation of

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143. Yoder, 406 U.S. at 215.

144. *Id.* at 216.

145. *See, e.g.*, *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (discussing American Indians seeking the right to perform peyote rituals).

146. *See, e.g.*, *Yoder*, 406 U.S. at 205 (discussing Amish seeking exemption from state law compelling their children to attend formal high school to age 16).

147. 604 P.2d 1068 (Alaska 1979).

148. *See id.* at 1071-72.

149. *Id.* at 1076 (Connor, J., dissenting).

game illegally taken based on the Free Exercise Clause.<sup>150</sup> Thus, the principle applied in *Frank* could apply to cultural practices of immigrants that were arguably related to their religious beliefs, even if the relationship is attenuated.

Similarly, in *Wisconsin v. Yoder*,<sup>151</sup> the Supreme Court noted the inseparability of the Amish religion and "way of life" in general, stating that "the Old Order Amish religion pervades and determines the entire mode of life of its adherents."<sup>152</sup> It is difficult to see where the Amish religion and culture divide, for constitutional purposes, under such a perspective.<sup>153</sup> In the end, what is "religious" is basically what the individual says it is, as long as some theistic concept is linked to that belief or practice.<sup>154</sup> If the belief is sincere and somehow relates to the concept of a deity or deities, that belief would warrant protection under the Free Exercise Clause of the First Amendment.<sup>155</sup>

When the conduct in question does constitute a religious rather than a purely cultural practice, triggering the strict scrutiny standard, the next question is what sort of governmental interest is deemed sufficiently compelling to overcome the protection of the Free Exercise Clause. As in the due process analysis, the "*malum in se*" versus "*malum prohibitum*" nature of the conduct criminalized seems relevant. In *Kargar*, for example, the prevention of actual child sex abuse would undoubtedly be viewed as a

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150. See *id.* at 1075.

151. 406 U.S. at 210.

152. *Id.*

153. See also Carol M. Messito, *Regulating Rites: Legal Responses to Female Genital Mutilation in the West*, 16 IN PUBLIC INTEREST 33, 55-59 (1997) (discussing the current debate as to whether female genital mutilation is a cultural or religious phenomenon).

154. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1181 (2d. ed. 1988) ("Religion" must be defined from the believer's perspective.).

155. See *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . The resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection." *Id.* See also *United States v. Seeger*, 380 U.S. 163 (1965) (defining religion in terms of what it is not, *i.e.*, not a political, social, or philosophical belief); *id.* at 178-79, (Douglas, J., concurring) (broadening the term "Supreme Being" to include the religious belief systems that do not subscribe to the existence of God, such as Hinduism, Buddhism, and others"). *Id.* at 188-89.

compelling interest.<sup>156</sup> The Maine court accepted Kargar's defense because he successfully argued that his conduct was in fact "non-sexual." Under such circumstances, no compelling State interest protected in the gross sexual assault statute was undermined by his conduct. Between these two ends of the spectrum—child abuse and non-sexual conduct—the point where State intrusion into religious acts is supported by a compelling interest blurs.

Traditionally, lines have been drawn distinguishing religious beliefs from religious practices. Although beliefs are sacrosanct, the State can curb practices when the freedom to participate in them is outweighed by societal interests. In *Reynolds v. United States*,<sup>157</sup> for example, the Supreme Court upheld a federal statute defining and providing for the punishment of polygamy even though the defendant offered evidence to show that polygamous marriage was a part of his religion.<sup>158</sup> In holding that polygamy would be illegal both for those who make polygamy a part of their religious belief and those who do not, the Court relied on the distinction between religious belief and religious practices.<sup>159</sup> Describing the statute as "within the legislative power of Congress," the Court questioned whether one could seriously contend that the civil government would not be able to outlaw human sacrifices claimed to be "a necessary part of religious worship" or the practice of wives who "religiously believed it was [their] duty to burn [themselves] upon the funeral pile of [their dead husbands]."<sup>160</sup>

The *Reynolds* decision can be criticized as a product of anti-Mormon sentiment, unacceptable within current parameters of judicial analysis. In upholding the anti-polygamy law, for example, the Supreme Court noted that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a

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156. See *United States v. Freeman*, 808 F.2d 1290 (8th Cir. 1987) (citing *New York v. Ferber*, 458 U.S. 747 (1982)) (citing the *Ferber* Court's recognition that "states [have] compelling interest in protecting children from sexual abuse").

157. 98 U.S. 145 (1878).

158. See *id.* at 166-67.

159. See *id.* at 166.

160. *Id.*

feature of the life of Asiatic and of African people.”<sup>161</sup> Such a consideration of traditional Western norms as a relevant touchstone for constitutional acceptability would seem untenable today.<sup>162</sup> Yet, *Reynolds* remains good law.<sup>163</sup> The Court’s references in *Reynolds* to immolation and other bodily harm retain resonance today. Although current thought might question equating the harm of plural marriage with burning widows, one point would seem to retain force and engender consensus: the State still has a compelling interest in prohibiting immolation, if not plural marriage, because of the practice’s physical destruction. In sum, consistent with the due process analysis, violence appears to be a serious, if not determinative factor. Applying the compelling interest standard suggested by the *Reynolds* Court, the government could prohibit and criminalize cultural and religious practices that involve violence or the infliction of bodily harm. Examples of such cultural

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161. *Id.* at 164. This adverse judicial treatment based on a practice or belief deemed Asian or African, as opposed to coming from Western traditions, was no aberration. The Chinese, for example, had been described by the Supreme Court in an earlier case as a “menace to our civilization” because, among other reasons, they “retained the habits and customs of their own country . . .” *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889). *See also* *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893) (noting that the Chinese, who were “of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests”).

162. *See* *Church of the Lukumi v. City of Hialeah*, 508 U.S. 520 (1993) (upholding animal sacrifice practiced as part of the Santeria religion, a fusion of traditional African and Roman Catholic beliefs and practices). *But see* *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 473 (1988) (Brennan, J., dissenting) (suggesting that the majority’s rejection of a Native American protest against the Forest Service for paving land sacred to the claimants “represents yet another stress point in the longstanding conflict between two disparate cultures - the dominant Western culture . . . and that of Native Americans”).

163. *See* *Potter v. Murray City*, 760 F.2d 1065, 1068, *cert. denied*, 474 U.S. 849 (1985) (holding that termination of police officer for practice of plural marriage did not violate his right to free exercise of religion). The *Potter* Court found that later precedent did not effectively overturn *Reynolds*; notably, the Court concluded that the State had a compelling interest in protecting monogamy because “[m]onogamy . . . is the bedrock upon which our culture is built.” *Id.* at 1070. *See also* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C.L. Rev. 1501 (1997) (explaining why polygamy restrictions can be upheld although gender-based marriage restrictions should be struck down).

practices would include marriage by capture (if it entailed kidnapping and forcible rape), killing adulterous wives, parent-child suicide, and female genital mutilation. Under this analysis, the government would not have a sufficiently compelling interest in criminalizing practices involving minimal violence or permanent bodily harm like male circumcision or non-violent, non-harmful offenses like the conduct at issue in *Kargar*.

Ultimately, some Western concepts of proper conduct act at least as a thumb on the scale in this balancing test.<sup>164</sup> For example, although the long-term harm from male circumcision may be minimal (and may possibly have health benefits),<sup>165</sup> the act, when imposed upon an infant, is by any definition painful.<sup>166</sup> Polygamy, on the other hand, has no violent overtones. Yet the law allows the violent act and prohibits the other. One explanation for this anomaly involves history and tradition. Although polygamy has been viewed as a threat to "the bedrock upon which our culture is built,"<sup>167</sup> male circumcision has been institutionalized over time. If the practice had never occurred before today, under the existing balancing test, a court might well find the act abusive and constitutionally unprotected. Conversely, recent analyses of marriage by same-sex couples demonstrate that, again, were courts writing on a clean historical slate, legal recognition of domestic relationships might be more expansive.<sup>168</sup> Using contemporary, mainstream

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164. See, e.g., *Potter*, 760 F.2d at 1068.

165. See Melissa A. Morgan, *Female Genital Mutilation: An Issue on the Doorstep of the American Medical Community*, 18 J. LEGAL MED. 93, 98 (1997) (noting that the medical community is "divided on the health benefits associated with male circumcision"). *Id.*

166. See Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 759 (1998) (citing AMERICAN ACADEMY OF PEDIATRICS, CIRCUMCISION: PROS AND CONS, GUIDELINES FOR PARENTS (1995) (documenting that "[t]he infant experiences pain along with the surgery")).

167. See *Potter*, 760 F.2d at 1070.

168. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*22 (Hawaii Cir. Ct. 1996) (holding that Hawaii statute forbidding same-sex marriage was unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution). Justice Powell, who wrote for the Majority in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court declined to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy" because such homosexual relationships were not "deeply rooted in this Nation's history and tradition," 478 U.S. at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)), later expressed regret for that decision.

American concepts of blameworthiness in weighing the compelling nature of the interest behind the criminalization of the conduct at issue makes sense because the strict scrutiny test balances the individual's interest in religion against society's interest,<sup>169</sup> and in America, society's interests are defined by contemporary, generally accepted values—the majority view. Hence, although violence may be one important factor, other factors such as sheer contemporary acceptance also have, and logically should have, some weight in the balancing test.<sup>170</sup>

2. *Parental Rights and Privacy.* Even if a defendant's particular cultural act is not deemed a religious practice protected under the First Amendment, it may still involve other protected behavior triggering a strict scrutiny analysis. For example, a parent has a liberty interest in directing the upbringing and education of his or her child.

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See JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 530 (1994). On October 18, 1990, while giving the annual James Madison lecture at New York University Law School, Justice Powell answered a student's question about *Bowers v. Hardwick*, indicating that he thought he had "probably made a mistake in that one." *Id.* Later, when a reporter called to confirm that remark, Justice Powell stated that "the dissent [in *Bowers*] had the better of the arguments." *Id.*

169. See *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

170. In contrast, sheer *historical* acceptance, as opposed to contemporary acceptance, should logically not play a role in the balancing test of societal interest versus individual rights. What matters is what society thinks now, not what it thought previously. The Supreme Court, however, appears to give historical acceptance considerable weight in the due process balancing test. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), for example, the Court stated that it would begin its analysis, as it does "in all due process cases, by examining our Nation's history, legal traditions, and practices." *Id.* at 710 (citing, *inter alia*, *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (citations omitted) (noting the importance of "careful 'respect for the teachings of history'")). In *Glucksberg*, while upholding a state statute prohibiting assisted suicide, the Court noted as an important factor the fact that "the Anglo-American common law tradition" has punished such activity. *Id.* at 711. See also *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (citations omitted) (declining to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy" because "[p]roscriptions against that conduct have ancient roots" and such conduct is not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty"). But see *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (noting that laws targeting a particular group because of societal disapproval must have legitimate State purpose distinct from mere societal disapproval).

dren.<sup>171</sup> The State cannot interfere with parental rights simply because the parent's conduct seems "odd"<sup>172</sup> or "foreign."<sup>173</sup> In another example,<sup>174</sup> the Supreme Court struck down a law prohibiting the teaching in school of any language other than English.<sup>175</sup> The plaintiff teacher had taught German to a child in a parochial school maintained by the Zion Evangelical Lutheran Congregation.<sup>176</sup> The Nebraska Supreme Court had upheld the law as justified in order to teach the children of immigrants to assimilate.<sup>177</sup> In reversing the Nebraska court, the United States Supreme Court held that the Fourteenth Amendment's protection against deprivations of liberty includes, "[w]ithout doubt, . . . the right of the individual . . . to marry, establish a home and bring up children, . . . according to the dictates of his own conscience . . ."<sup>178</sup> The rationales of promoting "civic development" or "American ideals" in immigrants were not sufficiently compelling to justify the illegalization of teaching foreign languages.<sup>179</sup> Thus, the goal of "Americanization" cannot trump a parent's liberty right to bring up children as desired; some other overriding interest is required to supersede a parent's right.<sup>180</sup> This familial interest is closely linked to the privacy right recognized by the Supreme Court in the "penumbra" of the Constitution.<sup>181</sup>

Whatever one believes are the proper parameters, if any, of these "penumbra" protections, the point for the purposes of analyzing the place culture has in applying these constitutional rights is that such familial or privacy

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171. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

172. *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972).

173. *Meyer v. Nebraska*, 262 U.S. 390, 398-99 (1923).

174. See *id.*

175. See *id.* at 403.

176. See *id.* at 396.

177. See *id.* at 398 (citing *Meyer v. Nebraska*, 187 N.W. 100 (Neb. 1922)).

178. *Id.* at 399.

179. See *id.* at 401-402.

180. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents," and court decisions "have respected the private realm of family life which the state cannot enter.").

181. See *Griswold v. Connecticut*, 381 U.S. 479, 516 (1965) (stating that right to privacy embraces the right to marry, establish a home, and bring up children).

interests seem likely to be implicated in many cases where culture is an issue. Logically, the area of sexuality and family relations in general is the ripest for potential cultural clashes because it is that aspect of life in which cultures often vary most significantly. For example, some social commentators suggest that the Chinese tend to be more group oriented than Americans, living together under one roof with many extended family members.<sup>182</sup> In such a culture, "children are expected to be obedient to their parents" and respect for elders is considered to be a "basic virtue."<sup>183</sup> In an "individualistic" culture like the United States, "children are treated as equals" and "encouraged to be independent at an early age."<sup>184</sup> To a greater extent than in the West, some say that women in Japan, Korea, and other, less developed Asian societies are treated differently from men both socially and legally.<sup>185</sup> Girls are expected to work in the labor force only until they are married, at which time they are expected to work solely in the home.<sup>186</sup> In some cultures, women may even be treated as chattel.<sup>187</sup> By contrast, in Scandinavian countries, a high degree of sexual equality and sex role fluidity is said to exist.<sup>188</sup> Regarding sexuality, some say many Latinos feel uncomfortable discussing the topic, considering such talk to be disrespectful and taboo.<sup>189</sup> Differences regarding family values, however, are not only a product of culture or geography, but also the historical period and people's individual beliefs. Hence, this area has proven to be a sen-

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182. See Laura Nowak D. Dong, *Intercultural Differences Between Chinese and Americans in Business*, 60 BULL. ASSOC. FOR BUS. COMM. 115, 116 (March 1, 1997).

183. See James H. Davis, F. David Schoorman & Lex Donaldson, *Toward a Stewardship Theory of Management*, ACAD. MGMT. REV., January 1, 1997, at 20.

184. See *id.*

185. See Francis Fukuyama, *Asian Values and the Asian Crisis*, COMMENTARY, Feb. 1, 1998, at 23.

186. See *id.*

187. See Jennifer Gould, *Undiplomatic Behavior: Those Bad-Boy Envoys: Seduction, Secrecy, Sexual Assault*, VILLAGE VOICE, May 20, 1997, at 32 (reporting on sexual harassment by United Nations delegates from foreign countries).

188. See Frederick R. Lynch, *The Diversity Machine (Workplace Diversity)*, SOCIETY, July 17, 1997, at 32.

189. See Joseph Hanania, *Facing their Fears, the Latino Men's Group is Helping its Members Modify Risky Sexual Behavior and Reach Out in an Ethnic Group that is Still Reluctant to Acknowledge AIDS*, L.A. TIMES, May 20, 1997, at B2.



sitive battleground for constitutional disputes, whether or not "culture" is involved.<sup>190</sup>

In sum, currently applicable analysis of religious, parental, and privacy rights show that (1) sincerity of belief is important; (2) the more the "belief" is reflected in "acts," the more subject it is to limitation; (3) violent acts are most subject to repression; and (4) because the analysis involves balancing individual rights against societal interests, the definition of a societal interest can, in some cases, be crucial. Contemporary majority acceptance can be identified as the societal interest; some precedent supports past historical majority acceptance as reflecting a societal interest as well.

#### IV. RELEVANT COMMON PRINCIPLES

In looking at this existing framework for assertion of a cultural defense, one point becomes clear: assertion of the defense is based on the importance we place on the individual in our society.<sup>191</sup> The primacy of the individual can be identified as the moving force behind our political and legal system. "All men are created equal," perhaps the most fundamental of our legal rules, incorporates the idea that each individual is important.<sup>192</sup> This core tenet justifies our entire political structure. From a philosophical perspective, the United States was created as a nation-state, not by historical accident or ethnic proximity, but because individuals—with rights and consciences—joined together in voluntary association to form a government to protect their rights.<sup>193</sup> Based on this focus on the individual,

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190. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding that Georgia statute criminalizing homosexual sodomy does not violate the fundamental rights of homosexuals); but cf. *Baehr v. Mülke*, No. 91-1394, 1996 WL 694235, at \*22 (Hawaii Cir. Ct. 1996). See also *supra* note 167.

191. See Sylvia R. Lazos Vargas, *Deconstructing Homof[aneous] Americans: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1514 (1998) (describing individualism as a core American belief).

192. See *Regents of the Univ. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) ("Our Nation was founded on the principle that 'all Men are created equal.'"); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1953 (1997) ("The philosophical departure point for discourse about politics and government in the West is that 'all men are created equal.'").

193. In the preamble to the Massachusetts Declaration of Rights, the

our society imposes personal, not collective responsibility.<sup>194</sup> Due to the value we place on the individual, we believe that it is better for a hundred guilty defendants to go free than for one innocent individual to suffer.<sup>195</sup> Based on the same core value—the recognition of the importance of the individual—we recognize that “one size fits all” laws can fail to result in justice in individual situations.<sup>196</sup> We value mercy—the conviction that sometimes, based on the specifics of a situation, it is unfair to apply the general rule to a particular individual. As the Honorable Charles D. Breitel stated in his 1960 speech to the Third Dedicatory Conference on Criminal Justice, if every law enforcement officer, prosecutor, and court rigorously enforced every law as it was “precisely and narrowly laid down, the criminal law would be ordered but intolerable. Living would be a sterile compliance with soul-killing rules and taboos. By comparison, a primitive tribal society would seem free, indeed.”<sup>197</sup>

The right of the individual forms the very reason for the existence of each of the constitutional bases of a cultural defense: the First Amendment, the Due Process Clause, and other aspects of the Bill of Rights. All of these safeguards exist to protect the individual against the majority will.<sup>198</sup>

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drafter, John Adams, wrote: “The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good.” MASS. CONST. OF 1780, preamble (*reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 956-57 (Ben: Perly Poor, compiler, 1877)).

194. See *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring) (“The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law.”); Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 U.C.L.A. L. REV. 733, 792 (1998) (“[T]he use of group membership as a proxy for guilt is antithetical to the notions of individual responsibility and justice lying at the heart of . . . American . . . law.”).

195. See, e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (identifying as “a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”).

196. See, e.g., *State of Minnesota v. Kahn*, 555 N.W.2d 15, 21 (Minn. Ct. App. 1996) (Randall, J., concurring) (“All attempts at ‘one size fits all’ generally end up snaring the innocent and unwary more than criminals.”).

197. Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960), *quoted in* MODEL PENAL CODE § 2.12 cmt. at 403.

198. See *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995) (stating that “[a]nonymity is a shield from the tyranny of the majority” that

Over time, courts have concluded that the analysis under each of these protections of minority rights involves a balancing test.<sup>199</sup> The right of the individual is weighed against the harm to society that the exercise of the individual's rights might cause in that society.<sup>200</sup> With this understanding, a cultural defense is simply one manifestation of the clash between the individual and society recognized and treated under our constitutional framework. Although "culture" may appear to be a new, "flavor-of-the-month" legal interest, associated with such contemporary concerns as diversity, pluralism, and political correctness, it is instead just a newly clothed context in which the core, individualistic legal principles upon which our nation was founded are exercised. No new values are implicated, and existing law has already spent centuries weighing the proper balance for such values. Indeed, the recognition of any new cultural defense outside this existing balancing framework could lead to pernicious results, undermining our fundamental, core values. We must be careful to understand that a "cultural" defense involves respect for the *individual*—a classic value from the enlightenment era and the foundation of our nation. We should not inject a new, collectivistic value system into this framework for the sake of elevating "cultural" rights above the rights of any particular individual.

It is evident that existing *de minimis* statutes, the common law, and the Constitution already consider the same interests implicated in any cultural defense. For example, one factor examined under both a *de minimis* analysis and the Due Process Clause is the consequence

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"exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society").

199. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992) (citing *Poe v. Ullman*, 357 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds). In his dissent, Justice Harlan stated, "Due process has not been reduced to any formula. . . . The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." *Id.* at 849-50.

200. Cf. *Michigan State Police v. Sitz*, 496 U.S. 444, 449 (1990) (explaining Fourth Amendment analysis of constitutionality of sobriety checkpoint as a balance of the State's interest, the effectiveness of the State action, and the level of intrusion on the individual's privacy).

that can be suffered by virtue of a conviction; sometimes, as the authors of the Model Penal Code observed, a conviction alone, however lenient the sentence, is too harsh a penalty to pay.<sup>201</sup> Another factor relevant to the *de minimis* analysis, the Due Process Clause, and the strict scrutiny tests used where religious, parental or privacy rights are implicated, is harm. The inclusion of this factor reflects the basic principles in our jurisprudence that the law punishes acts, not thoughts,<sup>202</sup> and that society needs to balance its collective interests against individual beliefs.

## V. CONCLUSION

Certain minor, but important fine-tuning of existing statutory law can avoid convictions that violate our constitutional and common law recognition that culture can mitigate or absolve guilt in individual circumstances. Most significantly, adoption of a *de minimis*-type statute at both the state and federal level, to supplement prosecutorial discretion with judicial overview on a case-by-case basis, appropriately provides a last-chance escape hatch from injustice in exceptional situations—whether that exception is created by virtue of the defendant's culture or other factors. Although adoption of such a statute necessarily expands judicial discretion, potentially resulting in disparate treatment of similarly situated defendants (the disadvantage leading to sentencing guidelines and other efforts to standardize punishments), such discretion provides protection of such fundamental values of American jurisprudence as the primacy of the individual and the importance of mercy. That some judges may abuse their discretion does not warrant its elimination. In addition, other statutes can be changed to reduce the potentially grave consequences of conviction. One factor identified by

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201. See MODEL PENAL CODE § 2.12 cmt. at 400-401 (quoting ROYAL COMM'N APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES, REPORT, 1879, Cmnd. 2345, at 65. ("[W]hile exempting the person from punishment under a sentence, [awarding nominal punishment or discharging the person convicted on his own recognizance] may still leave him subject to the most serious consequences; for example," forfeiting a pension or being disqualified from holding a liquor license.).

202. See *Proctor v. State*, 176 P. 771, 772 (Okla. Crim. App. 1918) (holding that states cannot criminalize intent alone). See also WAYNE R. LAFAYE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW § 25, at 177 (1972).

the Maine Court in applying the *de minimis* statute was the fact that Kargar's convictions exposed him to deportation under federal law. Pursuant to current deportation statutes, an alien is deportable if he is convicted of two "crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," even if no prison sentence is imposed.<sup>203</sup> The relationship between such a potentially harsh consequence and cultural issues is obvious. By changing the deportation law to focus on the sentence as well as the conviction, less reason for expunging the conviction would result, in turn reducing the number of situations in which the *de minimis* statute would need to be applied in the first place.<sup>204</sup>

Another positive step would be to retain the primacy of intent in our criminal statutes, particularly when sex or family relations are involved. Maine eliminated any state of mind requirement for conviction under its gross sexual assault statute,<sup>205</sup> presumably to preclude defendants from arguing, for example, that they were too drunk to know what they were doing when committing criminal acts.<sup>206</sup> Revisiting the elimination of any *mens rea* requirement for sex offenses makes sense. If a defendant's voluntary disturbance of his or her mental capacities through alcohol

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203. See 8 U.S.C. § 1227 (a)(2)(A)(ii) (Supp. 1998).

204. On the one hand, the current trend appears to go in the opposite direction—less protection of aliens' rights, not more, creating an even greater need for some sort of escape hatch in exceptional situations. See Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850, 1853-54 & 1863 (1997) (describing the statutory elimination of habeas corpus and direct judicial review of deportation orders against certain aliens who are "deportable by reason of having committed a criminal offense" and the consequent erosion of aliens' due process rights). On the other hand, immigration law also seems to be gaining some recognition of cultural distinctions as a justification for refugee status. See *In re Kasinga*, Int. Dec. No. 3278 (B.I.A. June 13, 1996).

205. See *Mutual Fire Ins. Co. v. Hancock*, 634 A.2d 1312, 1314 (Me. 1993) (Glassman, J. dissenting) (stating, "The Legislature opted not to require intent in cases of gross sexual assault in order to focus the proof in such cases on whether the victim has been subjected to certain specified conduct by the defendant providing a specified state of mind in the victim without regard to the state of mind of the defendant.").

206. See, e.g., *State of Maine v. Crocker*, 387 A.2d 26, 27 (Me. 1978). Prior to the amendment of Maine's intoxication statute, 17-A M.R.S.A. § 58-A, the "existence of a reasonable doubt as to [a culpable] state of mind [could] be established by evidence of intoxication." *Id.* The statute was ultimately amended to preclude intoxication as a defense "unless it establishe[d] a reasonable doubt as to the existence of an element of the offense." *Id.* at 27, n.1.

or drugs were to constitute one way of meeting the required intent element, then the loophole that generated the elimination of the intent element would be removed. Similarly, failure to require actual knowledge of (or reckless indifference to) the child's age as an element of consensual, statutory rape<sup>207</sup> seems inappropriate under current constitutional principles of due process and privacy protections.<sup>208</sup>

Beyond such fine-tuning, however, no drastic changes in the law are warranted. Indeed, to make significant change could place culture above other interests and values, creating a host of problems in defining culture, avoiding disparate treatment, ensuring that no one is above the law, and protecting society's interest in collective adherence to laws enacted by its representatives. Constitutional and common law jurisprudence already recognizes and protects the interests reflected in a cultural defense and establishes a balancing test to weigh those interests against society's needs. "Culture" is just another category of minority rights engaged in the never-ending conflict in our legal system between such rights and majority will. Unnecessarily exalting one type of minority interest over all others upsets that delicate balance. Given the safeguards woven into our criminal justice system, recognition of a formal cultural defense is both unnecessary and potentially harmful to the very members of our immigrant communities most in need of society's protection—women and children.

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207. See, e.g., *Garnett v. State of Maryland*, 632 A.2d 797, 803-804 (Md. 1993) (stating that second-degree rape statute prohibiting sexual intercourse with underage persons establishes a strict liability offense that does not require any mens rea and does not allow for a mistake-of-age defense).

208. See generally Benjamin L. Reiss, *Alaska's Mens Rea Requirements for Statutory Rape*, 9 ALASKA L. REV. 377, 377 (1992) (arguing that the "failure to demand proof of a culpable mental state [for the crime of statutory rape] conflicts with due process ideals").

